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NO. 83-1044
IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ROBERT JOHN WINICKI,
Petitioner,
v.
ROBERT A. MALLARD, et al.,
Respondents.

On Writ of Certiorari to the
Florida First District Court of
Appeal

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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NO. 83-1044

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUPPLEMENTAL STATEMENT OF THE CASE

The Respondents, Mallard, Roberts, Miller and Smith, supplement the peti-

tioner's Statement of the Case with the following facts in order to clarify the history of the litigation now before this Court:

1. At the time Petitioner Winicki filed the instant action in state court, two separate challenges to the durational residency requirement of which Winicki complained were pending in state courts, namely Osterndorf v. Turner, Case No. 81-864, Fifth District Court of Appeal, and Maguire v. Schultz, Case No. 81-2447, Second District Court of Appeal.

2. Osterndorf v. Turner, 426 So.2d 539 (Fla. 1982), on which the First District Court of Appeal relied in affirming the trial court, held that the durational residency requirement violated Article I, Section 2 of the Florida Constitution (equal protection clause).

3. On the appeal of the constitutionality of the residency requirement, Respondents conceded that Osterndorf was dispositive of the issue; therefore, the only substantive issue argued by either side in the appellate court was the ground on which the invalidity of the statute should be upheld. (AR. 1-12)[1]

4. The state trial court's Order on the attorneys' fee issue "adopts the reasoning of the Court in Cofield v. City of Atlanta, 648 F.2d 986 (5th Cir. June 23, 1981)," (A.3) (emphasis added), not the holding of the Cofield court.

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[1] The symbol "AR is to the Appendix of Respondent, and the symbol "A" is to the Appendix of Petitioner.

5. On rehearing of the fee issue, the First District Court of Appeal held that Florida law, not federal law, applied because the correctness of the trial court's holding invalidating the residency requirement was expressly upheld solely on the basis of the Florida Constitution. (A.1, p. 6)

6. On rehearing of the fee issue, in dicta the First District Court of Appeal consults the pro se attorney litigant cases arising under the Freedom of Information Act ("FOIA"), then states that it seems that the performance of a service beneficial to the public generally "would be important" in a §1988 case. (A.1, p. 4).

SUMMARY OF ARGUMENT

1. Petitioner fails to establish that the state court decided a federal

question in a way in conflict with an applicable decision of this Court. Therefore the Petition for Writ of Certiorari should be denied. 28 U.S.C. §1257(3); Supreme Court Rule 17.1(c).

2. The state appellate court decision indicates clearly and expressly that it is based on a bona fide separate, adequate and independent state ground. Therefore, the Petition for Writ of Certiorari should be denied.

ARGUMENT

The Petition for Writ of Certiorari should be denied. Petitioner seeks to invoke the discretionary jurisdiction of this Court pursuant to 28 U.S.C. §1257(3), (Brief of Petitioner at 4), by contending that the First District Court of Appeal, the state court of last resort,

decided the federal questions he presents in a way in "direct conflict" with this Court's holdings in Maher v. Gagne, 448 U.S. 122 (1980); Maine v. Thiboutot, 448 U.S. 1 (1980) and Hensley v. Eckerhart, ___ U.S. ___; 76 L.Ed.2d 40 (1983), (Brief of Petitioner at 11), as is prescribed in Supreme Court Rule 17.1(c). The conflicts presented by Petitioner are contrived. The state court has not decided a federal question in a way in conflict with any applicable decisions of this Court. Furthermore, the state court decision indicates clearly and expressly that it is based on a bona fide separate, adequate and independent state ground. Therefore, Respondents respectfully submit that this Court should not undertake the certiorari review of the state court decision.

I.

In the first question presented, Petitioner asks whether 42 U.S.C. §1988 applies to 42 U.S.C. §1983 claims, filed in state court, alleging violation of federal constitutional rights. Then, he asserts that this question "has been conclusively answered in the affirmative in Maine v. Thiboutot, 448 U.S. 1, 10 (1980)." (Brief of Petitioner at 12.) The conclusive answer provided by Maine v. Thiboutot pertinent to this question is that there is no merit to the contention that §1988 does not apply to §1983 claims in state courts. 448 U.S. at 10. The First District Court of Appeal does not hold that §1988 does not apply to §1983 claims in state courts. It holds that §1988 is not applicable in this action because it invalidated the residency

requirement on state constitutional grounds. Applying Florida law on attorneys' fees, the First District Court of Appeal finds that there is no basis for award of attorneys' fees in this case. (A.1, p.6) There is no conflict between the First District Court of Appeal's holding based on state grounds and Maine v. Thiboutot. The state court's holding constitutes a bona fide separate, adequate and independent state ground precluding this Court's acceptance of jurisdiction. Michigan v. David Kerk Long, ___ U.S.____, 51 U.S.L.W. 5231, 5234 (July 6, 1983).

Moreover, Petitioner claims that Maher, 448 U.S. at 132, "expressly states that 42 U.S.C. §1988 'was not limited to awarding fees only when a constitutional or civil rights claim is actually decided.'" (Brief of

Petitioner at 12). Winicki implies that Hensley, 76 L.Ed.2d at 50-51 stands for the same proposition. (Brief of Petitioner at 12). Therefore, Winicki argues that the Florida appellate court's affirmance of his federal claims on state constitutional grounds is irrelevant to the determination of his entitlement to fees under §1988 in the instant case (Brief of Petitioner at 12-13), apparently suggesting another conflict between the holding of the state appellate court and the decisions of this Court. No such conflict exists.

The passage Petitioner quotes from Maher, is taken out of context. This Court considered a petitioner's argument that a federal court is barred by the Eleventh Amendment from awarding attorneys' fees under §1988 against a

state in a case involving a purely federal statutory, non-civil rights claim. 448 U.S. at 130-31. This Court did not have to reach the question presented by the petitioner, id. at 131; however, in dicta it opined that the Eleventh Amendment did not bar the award in the Maher case because "clearly Congress was not limited to awarding fees only when a constitutional or civil rights claim is actually decided." Id. at 132. Maher considered the effect of a federal statutory, non-civil rights claim brought pursuant to §1983 on the award of fees under §1988. Maher did not consider whether it is proper for a state court to decline to award attorneys' fees under §1988 when a state statute is invalidated on state constitutional grounds; therefore, no jurisdictional conflict is presented.

Finally, in Hensley, the issue before this Court was the proper methodology for determining the amount of an attorneys' fee award under §1988 when a federal plaintiff succeeded on only five out of six of his federal constitutional challenges to the manner of treatment and placement of mental patients at a state hospital. 76 L.Ed.2d at 46-51. This Court established a test based on the results obtained. Id. at 50-51. In Hensley, this Court clearly did not address the same issue before the state court. There is no conflict between the state court and the decision of this Court.

II.

In the second question presented, Petitioner asks whether 42 U.S.C. §1988 requires a prevailing party to benefit the

public generally, as a precondition to an award of attorneys' fees. (Brief of Petitioner at 13). He concludes that in Hensley vs. Eckerhart, 76 L.Ed.2d at 48 & ns. 3-4, this Court's adoption of the Fifth Circuit's Johnson factors conclusively demonstrates that no such threshold requirement or precondition exists. (Brief of Petitioner at 13). Furthermore, he states that the state appellate court's holding is that benefiting the public generally is a precondition to an award of fees under §1988. This, he concludes, establishes the conflict jurisdiction of this Court. (Brief of Petitioner at 9 and 13).

To begin with, this Court in Hensley cites the twelve Johnson factors as properly considered when determining the amount of a fee award. 76 L.Ed.2d

at 48 & ns. 3 - 4. The threshold determination of whether a plaintiff had "prevailed", namely whether he has met the "preconditions" for an award of fees, was not the issue before this Court in Hensley. Id. at 46.

Equally significant is the fact that the First District Court of Appeal did not hold that §1988 requires a pro se litigant attorney to benefit the public generally as a precondition to an award of fees. In its discussion of the federal case law on the award of fees to pro se litigant attorneys, the state appellate court concludes that such an award of fees under §1988 is an open and unresolved issue in the federal courts (A.1, p. 3 and 10); therefore, the state court looks to the limited number of FOIA cases involving the

award of fees to pro se litigant lawyers for guidance. The court states that this is clearly not an FOIA case, but reasons that the determination of whether the pro se attorney litigant benefited the public generally or simply achieved a personal benefit "would be important in a case such as this case." (A.1, p. 4); see also Mid-Hudson Legal Services, Inc. v. G & U, Inc., 578 F.2d 34, 36-37(2d Cir. 1978). Then, the state court opines that Winicki derived only personal benefit so that even if federal law was applicable, fees were properly denied. It does not hold that public benefit is a precondition to an award of fees pursuant to §1988, and Hensley does not hold that public benefit is not a precondition to an award of fees under §1988. Therefore, there is no conflict on which to invoke the jurisdiction of this Court.

Assuming arguendo that the state

court dicta somehow conflicts with a decision of this Court on the public benefit issue, this Court should, nevertheless, deny the Petition for Writ of Certiorari because the state court decision indicates clearly and expressly that it is based on a bona fide separate, adequate and independent state ground. (A.1, p.6); Michigan v. David Kerk Long, 51 U.S.L.W. 5231, 5234. [2]

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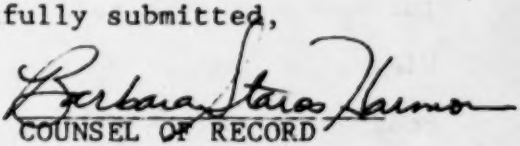
[2] The Florida Supreme Court in Osterndorf on which the First District Court of Appeal relied to invalidate the durational residency requirement (A. 5) stated:

> In the instant case, we choose to hold section 196.031(3)(e) unconstitutional under the equal protection clause of article I, section 2, of the Florida Constitution, and therefore do not address its constitutionality under the equal protection clause of the fourteenth amendment and the privileges and immunities clause of the United States Constitution.
> 426 So.2d at 544.

CONCLUSION

The Petition for a writ of certiorari to the Florida First District Court of Appeal should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI, have been furnished by U.S. Mail to Robert J. Winicki, Esquire, Mahoney, Hadlow & Adams, Post Office Box 4099, 100 Laura Street, Jacksonville, Florida 32201, this 27th day of January, 1984.

Barbara Staros Harmon
Counsel of Record

APPENDIX OF RESPONDENTS

IN THE FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

ROBERT A. MALLARD, et al.,

Appellants,

vs. CASE NO. AP-133

ROBERT JOHN WINICKI,

Appellee.
_____/

APPELLANTS' INITIAL BRIEF

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ARGUMENT

As stated in the Statement of the Facts and the Case, the Florida Supreme Court held the durational residency requirements of §196.031(3)(d) and (e), Fla.Stat. to be unconstitutional as violative of the equal protection clause of the Florida Constitution. Osterndorf v. Turner, Case No. 61,948. The opinion of December 16, 1982 and the opinion on rehearing dated February 3, 1983 are attached in the appendix to this brief.

The Appellants cannot distinguish Osterndorf from the instant case and concede that it is dispositive of the issues in this appeal. However, the trial court below based its decision on federal constitutional grounds. It is not necessary for this Court to reach the federal issues since the Florida Supreme

Court disposed of all issues under the equal protection clause of Article I, section 2 of the Florida Constitution. This court is bound by the reasoning of the Florida Supreme Court rather than of the trial court in this matter. Langley v. New Deal Cab Co., 138 So.2d 789 (Fla. 1 DCA 1962); cert. den., 155 So.2d 550 (Fla. 1963).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellants' Initial Brief and Appendix has been furnished by U.S. Mail to Robert John Winicki, Post Office Box 4099, Jacksonville, Florida 32202, this 4th day of February, 1983.

/s/BARBARA STAROS HARMON
Barbara Staros Harmon
Assistant Attorney General

IN THE FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

ROBERT A. MALLARD, et al.,

Appellants,

vs. Case No. AP-133

ROBERT JOHN WINICKI,

Appellee.

APPELLEE'S INITIAL BRIEF

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ISSUE

There is no issue on appeal from the trial court's ruling. Appellants should have filed a notice of dismissal of their appeal pursuant to Florida Rule of Apellate Procedure 9.350(b). In light of appellants' failure to utilize the correct procedural device to terminate their appeal, this court should affirm per curiam, in order that the court's and appellee's time be not further wasted.

Respectfully submitted,

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I HEREBY CERTIFY that a copy of the foregoing has been furnished to BARBARA S. HARMON, ESQ., Department of Legal Affairs, The Capitol, Room LL04, Tallahassee, Florida 32304; and LINDA L. BRYAN, ESQ., Office of General Counsel, 1300 City Hall, Jacksonville, Florida 32202, by U.S. Mail this 24th day of February, 1983.

/s/ROBERT J. WINICKI
Attorney

IN THE FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

ROBERT A. MALLARD, et al.,

Appellants,

vs. CASE NO. AP-133

ROBERT JOHN WINICKI,

Appellee.
_____/

APPELLANTS' REPLY BRIEF

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ARGUMENT

Appellants disagree with Appellee Winicki's reference, in his statement of the case and facts of the Answer Brief, to this case as an appeal from a non-final judgment pursuant to Rule 9.130, Fla. R. App. P.

It is Appellant's position that this appeal was taken, pursuant to Rule 9.110, Fla. R. App. P., from the final summary judgment of the Circuit Court, in and for Duval County, Florida, dated September 29, 1982. Although the trial court reserved ruling on the separate issue of attorneys' fees sought by Mr. Winicki, the Order was final as to the merits of the case as it was an end to the judicial labor and cause concerning the constitutionality of §196.031(3)(d) and (e), F.S.

Further, Appellants disagree with Mr. Winicki's assertion that appellants should have filed a notice of dismissal of the appeal.

The Appellants used the correct procedural device by timely submitting their Initial Brief which respectfully pointed out to this Court that the Florida Supreme Court's decision in Osterndorf v. Turner, Case No. 61,948 (Fla. Dec. 16, 1982), modified on reh'g, (Feb. 3, 1983) is dispositive of the instant case.

As discussed in the Initial Brief, the trial court below based its decision on federal constitution grounds. The Florida Supreme Court disposed of all constitutional issues under the equal protection clause of Article I, section 2 of the Florida Constitution.

Dismissal of the appeal by the appellants or simple affirmance by this Court of the Trial Court would result in inconsistent adjudication of a matter already resolved by the highest court of the state. This Court's order must be in harmony with the Florida Supreme Court in Osterndorf, supra. Langley v. New Deal Cab Co., 138 So.2d 789 (Fla. 1 DCA 1962); cert. den., 155 So.2d 550 (Fla. 1963).

Respectfully submitted,

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I HEREBY CERTIFY that a true and correct copy of the foregoing Appellants' Reply Brief has been furnished by U.S. Mail to Robert John Winicki, Post Office Box 4099, Jacksonville, Florida 32202, this 16th day of February, 1983.

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